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No. 93-133

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

MAXIMILLIAN ROBERTO SEALE, Petitioner,

v.

STATE OF UTAH, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I.

THE EVIDENCE AT TRIAL DID NOT SUPPORT AN INSANITY DEFENSE.

Respondent's apparent objective is to convince this Court that this case involves only issues of state law and that no genuine federal constitutional issues are presented.

Respondent proceeds by attempting to persuade the Court that petitioner was in fact mentally ill (Resp. Brief at 4-6, 10-

11). Respondent then attempts to convince the Court that Dr. Howell's testimony was sufficient, if believed by the jury, to make out the insanity defense under present Utah law. In that regard respondent states:

> Asked if Seale was capable of forming the intent to commit the alleged offenses, Dr. Howell expressed his doubts, stating he believed Seale's intent was possibly the result of mental illness (T.T. 244-45). He testified he was unsure if Seale was capable of forming a conscious objective to carry out his own acts (T.T. 259-60).

Resp. Brief at 11.

Having thus characterized Dr. Howell's testimony, respondent argues:

> Because of the severely delusional nature of Seale's schizoaffective disorder, untreated until 1989,

> Dr. Howell repeatedly stated his serious doubts about whether Seale was, at the time of the alleged acts, capable of having the requisite intent or whether Seale's intent was the product of his mental illness (T.T. 244-45). Dr. Howell, although unwilling to offer an unequivocal opinion, made clear he was uncertain if Seale was capable of forming a conscious objective to carry out his own acts. (T.T. 259).

Resp. Brief at 17-18.

Respondent has taken impermissible liberty in its characterization of Dr. Howell's testimony. While it is clear that Howell was convinced that petitioner was mentally ill, the doctor never expressed any doubt that petitioner was able to form the intent to undertake any act which he performed.

Respondent repeatedly cites page 259 of the trial transcript as evidence of Dr. Howell's uncertainty as to whether or not petitioner "was capable of forming a conscious objective to carry out his own acts."

The exchange between the trial court and Dr. Howell appearing on page 259 of the trial transcript reads:

> [BY THE COURT] I have a question, Doctor. And I'm not sure I understood your testimony.
>
> Would you clarify for me again what you said about the ability of the defendant to form the intent to commit these offenses with which he's charged.
>
> THE WITNESS: Well, Yeah. If you look at [Utah Code Ann. §] 76-2-305, it says that because of mental illness, a person lacked the mental state required as an

element of the offense.

THE COURT: Correct.

THE WITNESS: I have never seen a good definition of "lacked the mental state." If the mental state means intending to do it, I think that he intended -- whatever he did, I think he would have intended to do. But if mental state means mature, rational, free of mental disorder, then that's where I have my problems.

THE COURT: So you're not saying that he was not capable of forming a conscious objective to carry out his own acts?

THE WITNESS: No, I have not said that.

T. 259.

It is clear that Dr. Howell's testimony was insufficient to support, even prima facie, an insanity defense under present

Utah law.

In briefing this matter in the Utah Supreme Court, respondent seemed to concede that Dr. Howell's testimony was insufficient to support an insanity defense. At pages 25 and 26 of respondent's brief in that court, we read:

> [Defense counsel] consistently asked the right questions under section 76-2-305(1) about whether defendant, as a result of his mental illness, lacked the requisite mental intent (T.T. 241; 244-45; 260). Dr. Howell merely gave back answers that either not responsive or that vacillated on the question of defendant's ability to form the requisite intent (T.T. 244-45; 254; 259-60); these could easily have surprised even [defense counsel] by differing from what

> Dr. Howell said in pretrial questioning. . . .
>
> Although Dr. Howell's testimony may have been insufficient as a matter of law to permit the jury to consider a section 76-2-305 defense and return a verdict of not guilty by reason of insanity, the prosecutor did not object to the instructions permitting the jurors to find the defendant not guilty if they had a reasonable doubt about whether defendant had the required mental state (R.156-57; 170), even if they disbelieved defendant's denials and believed the victims' versions of his conduct.

Appellee's Brief (Utah Supreme Court case no. 910010) at 25-26.

Respondent apparently changed its position when the Utah Supreme Court

indicated that defense counsel's trial strategy was legitimate because "[t]he jury was entitled to accept [Dr. Howell's statement that there was a 'real possibility' that petitioner was mentally ill when the abuse took place] and find that Seale was mentally ill at the time of the offense. . ." (Pet. App. A16). Armed with this "holding," Respondent would have this Court believe that the evidence of mental illness, if believed by the jury, would have provided petitioner with a complete defense under Utah law.

While there was evidence before the jury from which it could have found petitioner "guilty and mentally ill," there was no evidence from which the jury could have concluded that petitioner, as a result of mental illness, "lacked the mental state required as an element of the offense charged."

State v. DePlonty, 749 P.2d 621 (Utah

1987), is the Utah Supreme Court's most comprehensive treatment of the Utah Insanity Defense Act of 1983. In that case the defendant raised the defense of diminished capacity and submitted to examination by two court-appointed mental health professionals.

Both examiners concluded that the defendant was mentally ill at the time of the offense. One of the examiners stated that "even though [the defendant] suffered from the chronic organic brain damage at the time of his crime, this mental state alone did not, in my opinion, negate his capacity to intentionally and knowingly enact in detaining, transporting, and assaulting the victim." Id. at 626.

In affirming the defendant's conviction and remanding the case for a hearing to determine whether or not the defendant was entitled to be sentenced as a mentally ill offender, the Utah Supreme Court noted:

> As defined by the [Utah

> Insanity Defense] Act, a defendant can be found mentally ill even though his mental illness does not entirely negate the mens rea of the crime charged. A defendant who suffers from a mental illness or defect, and therefore is mentally ill as defined by Utah Code Ann. §76-2-305 and is found to possess the state of mind necessary to commit the crime charged, despite his mental illness, should be found guilty and mentally ill as provided by the Act.

Id. at 627.

As the Utah Supreme Court's opinion in the instant case notes: "[T]he jury was instructed that it could find Seale not guilty, not guilty by reason of insanity, guilty, or guilty and mentally ill for each of the seven counts submitted to them"

(Pet. App. A11). If the objective had been to obtain any verdict other than "guilty", a defense establishing any mental illness would arguably have had some legitimacy.

Defense counsel who is pursuing a legitimate trial strategy may nevertheless fail to provide effective assistance if the strategy is in conflict with the client's chosen objectives. See Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981) ("the constitutional right of a criminal defendant to pleas 'not guilty' * * * entails the obligation of his attorney to structure the trial of the case around this client's plea"), cert. denied, 454 U.S. 1091, 102 S.Ct. 656, 70 L.Ed.2d 630 (1981); Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983), cert. denied 470 U.S. 1059, 105 S.Ct. 1776, 84 L.Ed. 2d 835 (1985); People v. Hattery, 109 Ill.2d 449, 94 Ill. Dec. 514, 488 N.E.2d 513 (1985) ("Although counsel's strategy may have been reasonable in light of the

evidence . . . it was an impermissible one"), cert. denied 478 U.S. 1013, 106 S.Ct. 3314, 92 L.Ed.2d 727 (1986); Nixon v. State, 572 So.2d 1336 (Fla. 1990), cert. denied ___ U.S. ____ 112 S.Ct. 164, 116 L.Ed.2d 128 (1991); State v. Anaya, 134 N.H. 346, 592 A.2d 1142 (1991) ("[a] lawyer shall abide by a client's decisions concerning the objectives of representation").

The Utah Supreme Court's suggestion that the jury could have found petitioner mentally ill may serve to legitimize defense counsel's strategy if petitioner's objective had been to qualify for sentencing as a mentally ill offender. Petitioner's objective was to avoid conviction by asserting his innocence.

II.

THE RECORD SUPPORTS PETITIONER'S CLAIM OF CONFLICT WITH DEFENSE COUNSEL REGARDING TRIAL STRATEGY.

Respondent contends that this Court

should not review petitioner's claim that he was denied the effective assistance of counsel as the result of a conflict with trial counsel regarding defense strategy because the record fails to disclose the existence of any conflict.

Petitioner contends that the record clearly indicates the conflict. Throughout the pretrial proceedings petitioner steadfastly maintained his innocence and denied that he was or ever had been mentally ill (T.237, 253, 257). Upon arraignment he entered a plea of "not guilty" (T.6 (arraignment)). It was defense counsel who asked that alternative pleas of "not guilty by reason of insanity" be entered on petitioner's behalf (T.6-7 (arraignment)).

Defense counsel called an expert witness for the purpose of attempting to convince the jury that, notwithstanding his denials of mental illness, petitioner was in fact mentally ill (T.226-61). Furthermore,

defense counsel's questions to Dr. Howell suggested that when petitioner testified he would deny any mental illness and that this denial may itself be evidence of the disorder (T. 257). Consequently, counsel undermined petitioner's credibility as a witness before he even took the stand.

Petitioner then testified denying that he had ever abused the children (T.278-79, 289). Furthermore, he denied that he was suffering from any mental illness or that he had suffered from any mental illness during the time frame during which the offenses were allegedly committed (T.274-75).

In closing argument defense counsel urged the jury to acquit the defendant of any "crimes he may have committed while under the influence of that mental illness" (T.308, 314-15).

It can hardly be said that the existence of the conflict between petitioner and his trial counsel is not apparent from a

review of the record.

Petitioner concedes that, as a general rule, in determining whether counsel's performance was deficient, a court must generally exercise deferential scrutiny. As this Court stated in Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed. 2d 674 (1984): "It is all to easy for a court examining counsel's defense after it has proven unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." 466 U.S. at 689, 104 S.Ct. at 2065.

Strickland involved the evaluation of defense counsel's judgment and performance in matters of tactic or strategy which lie within trial counsel's prerogative and may not be dictated by the client. In such matters the danger of second-guessing defense counsel is apparent.

> [U]nder the sometimes imperceptible influence of the

> failure of counsel's efforts to obtain a successful result, it is often practically difficult for judges to review and assess the reasonableness of counsel's acts or omissions, as they must, under the circumstances as they stood at the time that counsel acted or failed to act.

People v. Ledesma, 729 P.2d 839, 867 (Cal. 1987).

Petitioner contends that the record in the instant case clearly demonstrates a fundamental conflict between the approach petitioner chose to advance and the theory of defense which counsel espoused. These differences did not relate to purely tactical decisions which lie exclusively within counsel's prerogative and which must be evaluated against a background of nuance not readily observed or appreciated in a review of the trial record.

CONCLUSION

It is respectfully submitted that the evidence presented at trial was clearly insufficient to support an insanity defense and that the existing record adequately demonstrates a conflict between petitioner and counsel regarding the fundamental strategy of his defense. Petitioner requests that a Writ of Certiorari issue in this case for review of the decision of the Utah Supreme Court.

DATED this 14th day September, 1993.

Respectfully submitted,

/S/

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